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# Immunity, Italian Style: Silvio Berlusconi Versus the Italian Legal System

By BRENDAN QUIGLEY\*

## I. Introduction

On December 13, 2009, billionaire Italian Prime Minister Silvio Berlusconi was struck in the face by a souvenir statuette while he was greeting a nighttime crowd in Milan.<sup>1</sup> News cameras captured him grimacing, face bloodied, as he ducked into a car and was rushed away to a nearby hospital.<sup>2</sup> Ever meticulous about his polished appearance, the damage to Berlusconi's face – while not serious – seemed to mirror the battering that his political image had taken in the months prior and signaled an important, while perhaps unintended, message: Mr. Berlusconi is not immune to attack.

The more serious assault on Berlusconi's power and influence, however, occurred a month earlier on October 7, 2009, when the Italian Constitutional Court overturned a law that granted immunity from prosecution to the holders of Italy's four highest public offices, the Prime Minister among them.<sup>3</sup> This was of particular importance

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1. Elisabetta Povoledo & Rachel Donadio, *Attacker Fractures Berlusconi's Nose*, N.Y. TIMES, Dec. 14, 2009, at A5.

2. *Id.*

3. Rachel Donadio, *Italian Court Rejects Prime Minister's Immunity*, N.Y. TIMES, Oct. 8, 2009, at A6.

to Mr. Berlusconi who, by way of the immunity law, had been able to evade two cases against him, one in connection to a bribe that he had paid to a British lawyer and another for alleged fraud related to the purchase of TV rights by his media company, Mediaset.<sup>4</sup> In the wake of the Court's decision, with the trials against the embattled Prime Minister set to continue, Berlusconi again pushed a measure through Parliament that conferred temporary immunity upon Italy's highest officeholders.<sup>5</sup> Once again, in January of 2011, the Constitutional Court fought back, invalidating important revisions of the newest law and forcing the Prime Minister back into a defensive position.<sup>6</sup> In the wake of the Court's latest decision, however, Berlusconi has shown little willingness to give up the fight.<sup>7</sup>

Berlusconi is no stranger to legal inquiry. Despite his long tenure at the head of the center-right in Italy, he has often been accused of corruption, false accounting, and general abuse of power.<sup>8</sup> Over the course of the past twenty years, he has evaded incarceration by way of the statute of limitations in four major cases. He has been found guilty and then acquitted on appeal in a handful of others.<sup>9</sup> Berlusconi is routinely the subject of scandalous media reports detailing his penchant for lavish parties and younger women.<sup>10</sup> He is an intriguing and cunning figure whose enduring appeal in Italy is a perplexing anomaly.

This note examines Berlusconi's place within Italy and his

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4. *See id.*

5. *See, e.g.,* Daniel Makosky, *Italy Lower House Approves Bill Protecting Berlusconi from Prosecution*, JURIST, Feb. 4, 2010, <http://jurist.law.pitt.edu/paperchase/2010/02/italy-lower-house-approves-bill-that.php>.

6. John Hooper, *Italian Court Waters Down Berlusconi Immunity Law*, GUARDIAN (London), Jan. 13, 2011, available at <http://www.guardian.co.uk/world/2011/jan/13/italian-court-berlusconi-immunity-law>.

7. Berlusconi has "no intention of stepping down, whatever the court's ruling" on legitimate impediment law. Elisabetta Povoledo & Gaia Pianigiani, *Automatic Immunity for Berlusconi Revoked*, N.Y. TIMES, Jan. 14, 2011, at A11.

8. The Italian PM is current the subject of no fewer than four different legal controversies. *See, e.g., Trials and Tribulations*, ECONOMIST, Mar. 10, 2011, available at <http://www.economist.com/node/18333133>.

9. *See, e.g., Berlusconi Wins in Court*, N.Y. TIMES, Oct. 29, 1999, at A8; *see also High Court Clears Berlusconi in '87 Case*, N.Y. TIMES, Oct. 2, 2001, at A10.

10. A recent scandal concerning so-called "bunda bunga" parties is a good illustration. Nick Squires, *Silvio Berlusconi May Have Paid for 'Bunga Bunga' Girls' Cosmetic Surgery*, TELEGRAPH (London), Feb. 28, 2011, <http://www.telegraph.co.uk/news/worldnews/silvio-berlusconi/8353103/Silvio-Berlusconi-may-have-paid-for-Bunga-Bunga-girls-cosmetic-surgery.html>.

continuing, impressively successful – and oftentimes alarming – methods to evade conviction. Section II provides an overview of the Prime Minister's financial, legal, and political history. Section III outlines the Italian legal system and the Italian Constitutional Court. Section IV describes the development of the concept of immunity for government officials, from an international and domestic standpoint. Section V examines the history of executive and legislative immunity within Italy, including Berlusconi's attempts to protect himself, and the Constitutional Court's responses. Finally, Section VI evaluates the impact that the 2009 and 2011 Constitutional Court decisions have had on Italy and what they suggest about important targets for judicial reform. While the recent invalidations of Berlusconi's attempts at immunity represent an important symbolic and legal step, strengthening the rule of law and democracy within Italy, they do not appear to have affected Berlusconi in a meaningful way. These decisions have, however, required creativity on his part in negotiating the complicated legal path ahead. More importantly, though, Berlusconi himself – and all of his legal travails – have exposed the dangers that his conflicts of interest pose to the legitimacy of the Italian government. Further, taking the Prime Minister's own experience with statutes of limitations, the extreme delay and backlog in Italian courts has serious ramifications on the effectiveness of the justice system as a whole.

## II. Being Silvio Berlusconi

### A. *The Media Magnate*

Berlusconi was elected to his third term as Prime Minister on April 14, 2008, at the age of seventy-one, making him the second longest-serving Prime Minister in the history of Italy.<sup>11</sup> While his tanned visage has been the leading face of Italian politics for fifteen years, his influence over Italy extends far beyond the political. Berlusconi is one of Italy's richest men, with a fortune estimated to be in the billions,<sup>12</sup> owed mostly to a vast media empire – Mediaset –

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11. Berlusconi is the longest-serving Prime Minister of Italy since 1946, the time of the founding of the First Italian Republic.

12. In 2011, Forbes estimated the net worth of Berlusconi and his family to be \$7.8 billion, the third highest among Italians. See *The World's Billionaires*, FORBES, Mar. 11, 2011, [http://www.forbes.com/wealth/billionaires#p\\_1\\_s\\_arank\\_-1\\_\\_180](http://www.forbes.com/wealth/billionaires#p_1_s_arank_-1__180).

which comprises Italy's three largest private television channels.<sup>13</sup> Mediaset is part of Fininvest, a financial holding company founded by Berlusconi and controlled by the Prime Minister's family, which includes – among other entities – a major film production company, Italy's largest publishing company, an insurance and banking company, and Italy's most storied football club, AC Milan.<sup>14</sup> Further, before selling it to his brother, Berlusconi owned a leading daily conservative newspaper, *Il Giornale*. Political office aside, it is difficult to overstate the degree to which Berlusconi touches the everyday lives of Italians.

### ***B. Past Cases and Controversies***

As much as Berlusconi is known for his economic and political largesse, his power has not protected him from legal scrutiny. Indeed, the standing Prime Minister is the self-proclaimed “universal record-holder for the number of trials in the entire history of man,” and with good reason.<sup>15</sup> Although the extent of his legal troubles is difficult to quantify, his own estimates are astounding. Between 1994 and 2011, the Prime Minister purportedly spent \$430 million on legal fees.<sup>16</sup> In 2008, Berlusconi went on record with his contention that, over the course of his political career, he had endured 2,500 court hearings, and 577 “visits” from police.<sup>17</sup> Charges against him have been largely (though not completely) related to his media empire and other financial holdings, and range from corruption to false accounting.<sup>18</sup>

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13. See *Berlusconi in a Box*, ECONOMIST, Sept. 14, 2006, available at [http://www.economist.com/node/7912736?story\\_id=7912736](http://www.economist.com/node/7912736?story_id=7912736).

14. Fininvest board of directors includes three of Berlusconi's three oldest children. Marina Berlusconi, his first born, is Chairman of the Board. See generally FININVEST, [http://www.finvest.it/en/holding/board\\_of\\_directors](http://www.finvest.it/en/holding/board_of_directors).

15. He also included all “other creatures who live on other planets.” Rachel Donadio, *Italy Finds Lawyer Guilty of Taking a Bribe in Exchange for Protecting the Premier*, N.Y. TIMES, Feb. 18, 2009, at A6.

16. Lorenzo Totaro, *Berlusconi Approves Italian Justice Overhaul as Prostitution Trial Looms*, BLOOMBERG, Mar. 10 2011, <http://www.bloomberg.com/news/2011-03-10/berlusconi-passes-italian-justice-overhaul-as-sex-trial-looms.html>.

17. *Berlusconi Counts Cost of Legal Battles*, JAVNO, Jun. 25, 2008, [http://www.javno.com/en-world/berlusconi-counts-cost-of-legal-battles\\_159057](http://www.javno.com/en-world/berlusconi-counts-cost-of-legal-battles_159057).

18. For example, in 1996, Berlusconi went to trial to respond to allegation that units of Fininvest had bribed government tax inspectors in exchange for favorable audits. See John Tagliabue, *Ex-Premier Goes on Trial In Milan For Bribery*, N.Y. TIMES, Jan. 18, 1996, at A3. Then, in 1997, Berlusconi was convicted of falsifying the price of a film company bought by Fininvest in 1989, allegedly to set up a slush fund. Celestine Bohlen, *Former Italian Premier Found Guilty of Setting Up Slush Fund*,

Nonetheless, Berlusconi has evaded conviction in every case, proving to be as elusive as he is controversial.<sup>19</sup>

Due to the time-intensive appeals process in Italy and general judicial backlog, the running of the statute of limitations has served as a protective shield for the Prime Minister.<sup>20</sup> Over the past twenty years, Berlusconi has evaded conviction by way of the statute of limitations in at least four high-profile cases.<sup>21</sup> In other cases where the statute of limitations has not expired, the Prime Minister has always been acquitted on appeal.<sup>22</sup> At times, such acquittals have come on the heels of new laws passed to retroactively decriminalize the contested conduct.<sup>23</sup> More recently, Berlusconi has come under scrutiny for less savory conduct, including alleged ties to prostitution, the placement of fashion models in political positions, consorting with minors, and abuse of power.<sup>24</sup> Over the years, he has also been

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N.Y. TIMES, Dec. 4, 1997, at A9. One year later, he was indicted on charges that he had falsified books relating to the transfer of soccer star Gianluigi Lentini to his AC Milan. See Associated Press, *AC Milan's Owner Is Indicted*, N.Y. TIMES, May 29, 1998, at C7. See also *infra* Section V.C.3 for a explanation of current charges.

19. Berlusconi has never been definitively convicted. See *Profile: Silvio Berlusconi, Italian Prime Minister*, BBC NEWS, Apr. 5, 2011, <http://www.bbc.co.uk/news/world-europe-11981754>.

20. In 1999, the average civil dispute took ten years from first instance to final disposition in the Supreme Court. Vincenzo Varano, *Machinery of Justice*, in INTRODUCTION TO ITALIAN LAW 112 (Jeffrey S. Lena & Ugo Mattei eds., 2002).

21. Berlusconi has gotten off by way of the statute of limitations for charges related to false accounting in two cases, and bribing judges and financial police in two others. See *Q & A: Berlusconi v the Courts*, BBC NEWS, Jan. 14, 2010, <http://news.bbc.co.uk/2/hi/europe/7889288.stm>.

22. See, e.g., *Berlusconi Wins in Court*, N.Y. TIMES, Oct. 29, 1999, at A8; see also *High Court Clears Berlusconi in '87 Case*, N.Y. TIMES, Oct. 2, 2001, at A10.

23. Steve Scherer & Flavia Krause-Jackson, *Berlusconi Acquitted After Decriminalizing False Accounting*, BLOOMBERG, Jan. 30, 2008, <http://www.bloomberg.com/apps/news?pid=20601085&sid=a9Vs5.KfI78k>.

24. In summer of 2009, *La Repubblica* published a series of recordings made by a prostitute of her alleged encounters with Prime Minister Berlusconi at his official residence. After he publicly attacked the newspaper, he was served with a writ accusing him of abusing his office and seeking too much control over the media. Berlusconi threatened to counter-sue for publishing the recordings. Josephine McKenna & David Charter, *Silvio Berlusconi Sued By Paper That Carried Prostitute's Recordings*, TIMES (London), Jul. 23, 2009, <http://www.timesonline.co.uk/tol/news/world/europe/article6723875.ece>. The Prime Minister's wife, to whom he has been wed for twenty years, filed for divorce in 2009 in response to his alleged interactions with an eighteen-year-old "female friend." *Berlusconi's Wife to Divorce Him*, BBC NEWS, May 3, 2009, <http://news.bbc.co.uk/2/hi/europe/8031520.stm>. As of early 2011, proceedings are also pending against the Prime Minister in connection with alleged juvenile prostitution and abuse of power. *Ruby Red Face*,

accused of having close relationships with members of organized crime.<sup>25</sup>

Despite the broad scope of legal actions against him, Berlusconi has never conceded wrongdoing in any case or controversy. Instead, according to his accounting, his legal problems stem from a biased judiciary and a relentless left-wing conspiracy against him and his political machine.<sup>26</sup> However, perhaps admitting some culpability, yet indicative of his unrepentant stance in the face of allegations, Berlusconi explained in summer of 2009, "I am not a saint – everyone understands that."<sup>27</sup>

### C. Forza Italia: Berlusconi Enters Politics

#### 1. First Term

In the wake of the *mani pulite* (literally, "clean hands") anti-corruption campaign of the early 1990s – which exposed the breadth of fraud and bribery that had long permeated Italian politics – criminal prosecutions and resignations percolated throughout the government, leaving a political void.<sup>28</sup> Taking advantage of his charm,

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ECONOMIST, Feb. 10, 2011, available at [http://www.economist.com/node/18114883?story\\_id=18114883&CFID=161505590&CFTOKEN=69240952](http://www.economist.com/node/18114883?story_id=18114883&CFID=161505590&CFTOKEN=69240952).

25. From 1978 to 1985, Berlusconi set up the twenty-two holding companies that control Fininvest, injecting billions of lire into them, theoretically from Berlusconi's own coffers. In 1997, a Mafia financier alleged that Berlusconi had used 20 billion lire of Mafia money to build up his media empire. Investigators were not able to determine the source of the much of the funds Berlusconi used over the years. With access to the investigators' report, *The Economist* was unable to rule out Mafia ties and money laundering. *An Italian Story*, ECONOMIST, Apr. 26, 2001, available at [http://www.economist.com/world/displaystory.cfm?story\\_id=587107](http://www.economist.com/world/displaystory.cfm?story_id=587107).

26. See *The Law and Silvio Berlusconi*, Editorial, N.Y. TIMES, Oct. 9, 2009, at A30; Stacy Meichtry & Alessandra Galloni, *Italian Court Ruling Deals Blow to Berlusconi*, WALL ST. J., Oct. 8, 2009, at A10. Moreover, early in 2010, Berlusconi referred to Italian judges as the Taliban bent on subverting democracy in its attempts to undermine center-right legislative initiatives and his own agenda. *Court Insists That Silvio Berlusconi's Bribery Trial Must Continue Next Month*, TELEGRAPH (London), Feb. 27, 2010, available at <http://www.telegraph.co.uk/news/worldnews/europe/Italy/7332333/Court-insists-Silvio-Berlusconis-bribery-trial-must-continue-next-month.html>.

27. Mckenna & Charter, *supra* note 24.

28. The *mani pulite* anti-corruption campaign was a sweeping national judicial inquiry that exposed a far-reaching system of corruption – called *tangentopoli* ("bribesville") – which involved politicians, bureaucrats, and entrepreneurs. Beginning in 1992, with the arrest of the socialist manager of a public hospice, the investigation quickly expanded in scope throughout all of Italy. Within a couple of years, six former Prime Ministers, more than five hundred members of Parliament,

business savvy, and media presence, and under the flag of his newly created *Forza Italia* political party, Berlusconi became Prime Minister for the first time in 1994.<sup>29</sup> When elected, he had little political experience and had never held political office; the Italian public seemed unconcerned, subscribing to his argument that his lack of time in public office was an asset in the face of an unabashedly corrupt political culture.<sup>30</sup> Unfortunately for Italy, Berlusconi's ascendancy did not usher in a new era of clean or stable politics. Soon after the Prime Minister's election, his brother was arrested on corruption charges, later being convicted and sentenced to five months in prison.<sup>31</sup> Berlusconi himself was questioned by anti-graft magistrates with regard to tax fraud on the part of Fininvest, allegations with which he denied having any involvement.<sup>32</sup> Further, now that Berlusconi could exert control over public television, opposition newspapers and government officials raised concerns about potential conflicts of interest given the Prime Minister's near complete control of the media.<sup>33</sup> Only months after his election,

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and several thousand local and public administrators were subject to investigation. Months after it was initiated, most leading political figures resigned or went into exile. So dramatic was the campaign that it marked the end of the First Italian Republic. The long-term effect of *mani pulite* on the level of political corruption in Italy, however, is questionable at best. Alberto Vannucci, *The Controversial Legacy of 'Mani Pulite': A Critical Analysis of Italian Corruption and Anti-Corruption Policies*, 1 BULL. OF ITAL. POL. 233 – 34 (2009), available at [http://www.gla.ac.uk/media/media\\_140182\\_en.pdf](http://www.gla.ac.uk/media/media_140182_en.pdf).

29. Berlusconi created *Forza Italia* – appropriately named after the chant for the Italian national soccer team – to serve his own political ambitions in the new system of government that emerged following the corruption scandals of the early 1990s. He did so by taking advantage of his vast financial resources, and by appealing to a disenchanted electorate who saw in him the astuteness and good fortune lacking in the leadership of the previous era. Naturally, his unique brand of celebrity and influence over the media only helped his case. MICHAEL E. SHIN & JOHN A. AGNEW, *BERLUSCONI'S ITALY* 1 – 2, 10 – 11 (2008).

30. Berlusconi's center-right alliance won 46 percent of the vote, with the largest share going to *Forza Italia*, with 20 percent. See Alan Cowell, *Italy's Right Wing Heads for Victory in Landmark Vote*, N.Y. TIMES, Mar. 29, 1994, <http://www.nytimes.com/1994/03/29/world/italy-s-right-wing-heads-for-victory-in-landmark-vote.html?scp=2&sq=&st=nyt>; see also Alan Cowell, *Rightest Voters in Italian Vote Continue to Battle for Real Power*, N.Y. TIMES, Mar. 30, 1994, <http://www.nytimes.com/1994/03/30/world/rightist-victors-in-italian-vote-continue-battle-for-real-power.html?scp=1&sq=&st=nyt>.

31. Paolo Berlusconi was convicted for paying illicit contributions worth \$90,000 to a then-defunct political party. His sentence was suspended. Alan Cowell, *Italian Premier, Facing Defeat, Resigns Urging Elections*, N.Y. TIMES, Dec. 23, 1994, at A10.

32. *Id.*

33. Though Berlusconi gave up the directorships of all of his Fininvest companies



*Forza Italia* disintegrated amidst infighting, and he was forced to resign in the face of an all-but-certain no-confidence vote.<sup>34</sup>

## 2. Second and Third Terms

Being unseated from office amidst legal and political controversy did nothing to dampen Berlusconi's appetite for political power.<sup>35</sup> Neither did the ensuing wave of indictments that would follow his exit from office.<sup>36</sup> Just fifteen months after the right swept into power on the wings of change, a center-left coalition grabbed a historic victory, defeating a challenge from Berlusconi and the right, and placing its leader, Romano Prodi, in the Prime Minister's seat.<sup>37</sup> It would not be until 2001 that Berlusconi would find himself back at the helm of the Council of Ministers, amazingly still palatable to Italians as a public official, despite the panoply of indictments and convictions in the preceding years.<sup>38</sup> His second term in office would last almost five years – the longest of any post-World War II government – until Prodi and the center-left unseated the magnate-turned-politician in contentious national elections, continuing the game of political leapfrog.<sup>39</sup>

Two years following his second rise to leadership of the coalition

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(save AC Milan) when he entered politics, he remained the controlling shareholder. See *An Italian Story*, *supra* note 25. During his first term, Berlusconi would hand-pick the head of RAI (Italy's public service broadcaster), who then, over the course of the following months, changed the heads and the news teams of all three state networks and installed two former Fininvest employees at the top of RAI channels 1 and 2. MARY L. VOLCANSEK, CONSTITUTIONAL POLITICS IN ITALY 131-32 (2000).

34. Cowell, *supra* note 31.

35. Celestine Bohlen, *Italian Left Wins Big Breakthrough In National Vote*, N.Y. TIMES, Apr. 23, 1996, at A1, available at <http://www.nytimes.com/1996/04/23/world/italian-left-wins-big-breakthrough-in-national-vote.html>.

36. From his first time in office – when Berlusconi's business empire became a subject of the *mani pulite* investigations – until 1998, Berlusconi was charged, independently, with illegal financing of a political party, corruption and bribing of financial police, two counts of false accounting, as well as tax fraud, not to mention investigations that did not reach trial. See *An Italian Story*, *supra* note 25.

37. Bohlen, *supra* note 35.

38. See Alessandra Stanley, *Man in the News, Italy's Billionaire Victor*, *Silvio Berlusconi*, N.Y. TIMES, May 15, 2001, at A1. Berlusconi was facing four separate trials at the time that he entered office in 2001. SHIN & AGNEW, *supra* note 29, at 104.

39. The final results were extremely close: the final tally showed Prodi ahead by only 0.1 percent of the vote. Ian Fisher, *Berlusconi Says He Will Contest Italy Vote Tally*, N.Y. TIMES, Apr. 12, 2006, <http://query.nytimes.com/gst/fullpage.html?res=9D0DE2DC1F30F931A25757C0A9609C8B63&sec=&spon=&pagewanted=1>.

government, Prodi would lose a no-confidence vote in the Italian Senate and resign amidst the newest cycle of unrest in Italian politics.<sup>40</sup> Once again proving his staying power and showing an unparalleled ability to weather legal and political controversy, Berlusconi returned to office in April 2008, capitalizing on a fragmented left and increasing voter apathy.<sup>41</sup> The embattled billionaire Prime Minister remains in office today, though not without scandal or intrigue.<sup>42</sup> His political future, however, has never been more in question.<sup>43</sup>

### III. The Italian Legal System and the *Corte Costituzionale*

The Italian court system, like that found in other civil law countries, is characterized by a plurality of court hierarchies, distinguishing it from common law jurisdictions, where there is a single court hierarchy.<sup>44</sup> Broadly, aside from those courts that deal with specialized subjects,<sup>45</sup> Italian courts are divided into two different tracts: one for civil and criminal matters and another for administrative or public law disputes.<sup>46</sup> Legal disputes work their way from the court of first instance (*tribunale*) to the intermediate appeals court (*corte d'appello*), with final appeals going to the Italian Supreme Court (*Corte di Cassazione*), which serves as the court of last resort for non-constitutional issues.<sup>47</sup> The Constitutional Court (*Corte Costituzionale*), which heard its first case in 1956, is one of the

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40. Prodi's resignation marked the end of the sixty-first government in Italy since World War II. Ian Fisher & Elisabetta Povoledo, *Surprising Few, Italy's Government Collapses*, N.Y. TIMES, Jan. 25, 2008, at A3, available at <http://www.nytimes.com/2008/01/25/world/europe/25italy.html>.

41. See Ian Fisher, *Economy Ailing, Frustrated Italy Picks Berlusconi*, N.Y. TIMES, Apr. 15, 2008, <http://www.nytimes.com/2008/04/15/world/europe/15iht-15italy.11989449.html>.

42. For an overview of the most recent feminist revolt against the Prime Minister, see Nancy Folbre, *Feminists for the Italian Future*, N.Y. TIMES ECONOMIX BLOG, Feb. 21, 2011, <http://economix.blogs.nytimes.com/2011/02/21/feminists-for-the-italian-future/?ref=silvioberlusconi>.

43. 2010 saw Berlusconi only barely survive two confidence votes, saving his government from collapse. See *Silvio the Survivor*, ECONOMIST, Sept. 30, 2010, available at <http://www.economist.com/node/17155796>; see also Elisabetta Povoledo, *Berlusconi Scandal Could Threaten Government*, N.Y. TIMES, Nov. 1, 2010, at A11.

44. Varano, *supra* note 20, at 99.

45. *Id.* at 99.

46. *Id.*

47. *Id.* at 101.

specialized courts and functions outside of the ordinary and administrative court system.<sup>48</sup>

The Italian Constitution provides for a single constitutional court with the power of judicial review of legislation.<sup>49</sup> The Constitutional Court alone can pass judgment on the constitutionality of national laws, regional laws, and government acts having the force of law. Administrative regulations, however, are outside of its purview.<sup>50</sup> Aside from this power to rule on the constitutionality of laws, the Court has the authority to decide on conflicts relating to the allocation of powers between the branches of government, accusations against the President of the Republic, and on the constitutionality of referendums.<sup>51</sup> Cases come before the Court in one of two ways. The first occurs when a party to a dispute raises a constitutional issue during the course of normal litigation. In such a case, the lower court proceedings are suspended, and the Court rules on the constitutionality of the issue before remanding it back down for disposition.<sup>52</sup> Ninety percent of the cases that the Court hears are by way of this indirect process.<sup>53</sup> The alternate path is more direct: Namely, that a party lodges a complaint directly with the Court. This occurs in controversies between regions – or between the state and a region – and in conflicts among the branches of government.<sup>54</sup> The Court will also rule directly on popular referenda.<sup>55</sup> Decisions of the Court have the force of law and are binding on the entire court system.<sup>56</sup>

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48. *Id.* at 99.

49. Mario Comba, *Constitutional Law*, in INTRODUCTION TO ITALIAN LAW 53 (Jeffrey S. Lena & Ugo Mattei eds., 2002).

50. COSTITUZIONE [COST.][Constitution] art. 134 (Italy). An official English-language version of the Italian Constitution can be found on the website of Senato della Repubblica [Italian Senate], available at [http://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf). Note that the legal and constitutional system in Italy differs from that found in the United States, where the power to interpret the constitution is diffused throughout the system. Comba, *supra* note 49, at 54.

51. COST. arts. 134, 138 (Italy).

52. VOLCANSEK, *supra* note 33, at 25.

53. *Id.*

54. *Id.*

55. *Id.* at 26.

56. Comba, *supra* note 49, at 55.

## IV. Changing Conceptions of Official Immunity

### A. Origins

As Berlusconi has spent the past decade of his political career in pursuit of immunity from prosecution, it is useful to understand the origins and development of immunity from a domestic and international legal standpoint. Domestic immunity from suit for the highest elected officials has its foundation in public policy, permitting those charged with public service and policy-making to do so without disturbance.<sup>57</sup> When a head of state or other high-ranking official is subjected to liability for acts while in office, any potential charges and proceedings could disrupt the discharge of official duties, theoretically at the expense of the office and, by extension, the public.<sup>58</sup> Moreover, being liable for all conduct would potentially mean subjecting every decision and act to scrutiny, a reality that would likely impact governmental efficiency and present substantial problems of administrability. Given such concerns, the vast majority of high-ranking governmental officials throughout the world enjoy a qualified immunity from prosecution while in office.<sup>59</sup>

Aside from its historical connection to the sovereign's power over the people and the law, immunity from suit for official acts also has its origins in international law. With the growth of international diplomacy came the attendant need to ensure the safety and inviolability of a country's diplomatic envoys abroad. Reciprocal immunity from prosecution was a pragmatic and sensible way to address the problem, especially as governments began to send and receive officials for the conduct of international relations. Indeed, diplomatic immunity is likely among the least controversial and most

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57. In 2000, the Office of Legal Counsel at the U.S. Department of Justice confirmed a long-held DOJ opinion that criminal prosecution of a sitting President would undermine the capacity of the executive branch to perform its assigned functions. See *A Sitting President's Amenability to Indictment and Criminal Prosecution*, Op. O.L.C., Oct. 16, 2000, available at [http://www.justice.gov/olc/sitting\\_president.htm](http://www.justice.gov/olc/sitting_president.htm).

58. See generally *id.*

59. Exposing a sitting chief of state to lawsuits is unusual outside of the U.S. See Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 54 (1999). Most constitutions contain provisions granting immunity to members of Parliament and the head of state, although such immunity is generally functional and applicable only to official acts. Karin Oellers-Frahm, *Italy & France: Immunity for the Prime Minister of Italy and the President of the French Republic*, 3 INT'L J. CONST. L. 107, 110 (2005).

widely accepted principles in international law today.<sup>60</sup> Accordingly, such immunities have been codified in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, both of which contain provisions granting immunity to certain cadres of a sending state's official personnel.<sup>61</sup> Notably, the immunities granted under the Conventions pertain only to official conduct.<sup>62</sup>

## ***B. Development of Immunity for Elected Officials***

### *1. Parliamentary Immunity*

Within democratic political systems, members of national Parliaments generally enjoy immunity from prosecution for civil and criminal offenses, again often in relation to acts that fall within the scope of official duties.<sup>63</sup> Such immunities are delineated either in a country's constitution or under more specific domestic rules of procedure.<sup>64</sup> Generally, a representative democracy will immunize members of Parliament in one of two ways.<sup>65</sup> First, under what is often called the British model, such representatives can be protected

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60. MALCOLM N. SHAW, *INTERNATIONAL LAW* 669 (5th ed. 2003).

61. Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter *Vienna Diplomatic*]. Vienna Convention on Consular Relations art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter *Vienna Consular*].

62. The Vienna Convention on Diplomatic Relations provides: A diplomatic agent shall enjoy immunity from suit except in case of "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions." *Vienna Diplomatic*, *supra* note 61, art. 31(1)(c). The Vienna Convention on Consular Relations provides: consular officers and employees are not amenable to the jurisdiction of the authorities of the receiving State "in respect of acts performed in the exercise of consular functions." *Vienna Consular*, *supra* note 61, art. 43(1).

63. See Carmen Lane, *Parliamentary Immunity and Democracy Development*, DEMOCRACY BRIEFS (DAI, D.C.), Aug. 2007, at 1.

64. See, e.g., Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law], May 23, 1949, BGBl I, art 46. (F.R.G.), English translation *available at* <https://www.btg-bestellservice.de/pdf/80201000.pdf>; see also Rules of Procedure of the German Bundestag, Aug. 20, 2008, RGB1. I at 1712, Rule 107 (F.R.G.), English translation *available at* <https://www.btg-bestellservice.de/pdf/80060000.pdf>.

65. See generally Simon Wigley, *Parliamentary Immunity in Democratizing Countries: The Case of Turkey*, 31 HUM. RTS. Q. 567, 569 (2009); see also Lane, *supra* note 63, at 2; U.S. Agency for International Development [USAID], *Parliamentary Immunity Brief: A Summary of Case Studies of Armenia, Ukraine, and Guatemala* (2006), at 3.

by way of Parliamentary non-accountability.<sup>66</sup> This type of immunity has its origins in the 1689 English Bill of Rights which developed as a response to interference in Parliamentary debates by the crown.<sup>67</sup> Non-accountability essentially immunizes a representative's Parliamentary agency, i.e., actions or statements that a representative makes in his or her capacity as an elected lawmaker.<sup>68</sup> Any illegal activity that does not occur within this protective sphere, then, would fall outside of the purview of Parliamentary non-accountability. This scheme of Parliamentary immunity has typically been adopted by countries that were subject to British colonization.<sup>69</sup>

Under a second approach, members of Parliament can be protected by a scheme of Parliamentary inviolability which makes a representative's nonlegislative activity conditionally immune.<sup>70</sup> Historically, this broader scope of immunity arose and developed in France following the 1789 Revolution, where members of the National Assembly were seen as holding positions that were superior to other bodies of the State.<sup>71</sup> Under this model, nonlegislative acts or statements can typically only provide the basis for prosecution if Parliament consents, if the representative is caught in the act of committing the offense, or if the representative is no longer in office.<sup>72</sup> This approach to immunity for members of Parliament, known as the Continental or French model, is followed by the majority of the world's democracies and tends to be combined with aspects of non-accountability under the British model.<sup>73</sup> Italy's system adheres more closely to this broader approach than to that of the British model, though Berlusconi would undoubtedly like it to extend further.

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66. USAID, *supra* note 65, at 3.

67. Marilia Crespo Allen, *Parliamentary Immunity in the Member States of the European Union and in the European Parliament*, at 8 (July 1999), available at <http://www.agora-parl.org/sites/default/files/European%20Parliament%20-%20Parliamentary%20Immunity%20in%20the%20Member%20States%20of%20the%20European%20Union%20and%20in%20the%20European%20Parliament%20-%201999%20-%20EN%20-%20PI.pdf>.

68. See Wigley, *supra* note 65, at 569 – 70; USAID, *supra* note 65, at 3.

69. See Wigley, *supra* note 65, at 569.

70. *Id.* at 570.

71. See Allen, *supra* note 67, at 8.

72. See Wigley, *supra* note 65, at 570.

73. See *id.* at 569; see also COST. art. 68 (Italy), which outlines aspects of both non-accountability and inviolability.

## 2. Head of State Immunity

From a domestic standpoint, heads of state generally enjoy similar – if not enhanced – immunity from prosecution as that conferred upon members of Parliament.<sup>74</sup> Any differences in the scope of immunity for heads of state are likely the result of practical considerations attendant to carrying out official duties. Head of state immunity often finds its basis in a country's constitution, or as in the case of the U.S., from the powers and responsibilities inherent in a constitutional structure.<sup>75</sup> In general, heads of state will likely evade domestic prosecution for crimes committed while in office except in cases of treason, though the power to decide liability (or to impeach) is often in the hands of the legislature or Parliament.<sup>76</sup> Moreover, practical and political considerations regarding prosecuting a head of state may prevent charges from ever being brought.

Despite these broad trends, the past two decades have seen a considerable drawback in the prevailing standard of relative executive immunity.<sup>77</sup> Moreover, the emergent International Criminal Court (ICC) – which was formed for the purpose of prosecuting individuals for genocide, war crimes, and crimes against humanity – has shown a growing global consensus in favor of holding top government officials accountable for certain in-office conduct.<sup>78</sup> The creation and expansion of international judicial proceedings against heads of state has coincided with a rise in the displacement of high-level public

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74. Note that, oftentimes, the head of state is in fact a member of Parliament, as in Italy.

75. The U.S. Department of Justice has interpreted the U.S. Constitution as conferring broad immunity upon the president for reasons of separation of powers and effective execution of presidential duties. *See A Sitting President's Amenability to Indictment*, *supra* note 57.

76. *See* the French Constitution's provision on the liability of the President of the French Republic during office. 1958 LA CONSTITUTION [CONST.] art. 68 (Fr.); *see also* COST. arts. 90, 96 (Italy). It is important to note that this does not preclude liability outside of the country for violation of international laws as defined under the Rome Statute of the International Criminal Court.

77. No fewer than sixty-seven heads of state have been formally prosecuted for serious human rights violations or economic crimes committed during their administration since 1990. Ellen L. Lutz & Caitlin Reiger, *Introduction*, in PROSECUTING HEADS OF STATE 2 (Ellen L. Lutz & Caitlin Reiger eds., 2009).

78. As of October 2010, there are 114 countries that are parties to the Rome Statute. ICC, *The States Parties to the Rome Statute*, <http://www.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm> (last visited Mar. 10, 2011).

officials within countries, most often for economic crimes.<sup>79</sup> During the 1990s, Europe in particular saw a jump in corruption scandals that aided in unseating several heads of state.<sup>80</sup> Around that time, the Organization for Economic Cooperation and Development (OECD) and most European countries adopted treaties to stem the rise in bribery and inappropriate use of funds that appeared to be permeating the political and corporate classes of the continent.<sup>81</sup> Finally, the United Nations responded in kind with the Convention on Corruption, which entered into force on December 14, 2005, and requires member states to adopt measures to criminally punish national public officials for, inter alia, bribery, misappropriation of public funds, and obstruction of justice.<sup>82</sup> Clearly, international momentum – and an increase in domestic willingness to hold those in power accountable – suggests that holding office no longer creates an impermeable barrier to prosecution.

## V. Berlusconi's Enduring Fight for Immunity from Prosecution

### A. History of Italian Immunity Law

Until the past decade, immunity has historically been all but expressly disallowed for Italy's top government officials. The starting

79. Lutz & Reiger, *supra* note 77, at 8 – 9.

80. Aside from the inquiries and charges that accompanied the *mani pulite* investigations in the early to mid 1990s in Italy, German Chancellor Helmut Kohl was implicated in a huge slush around the same time, and Spanish Prime Minister Felipe Gonzalez lost power due to corruption. Since 1994, more than six hundred French politicians, including former Prime Ministers and elected representatives have been prosecuted or charged. Arnauld Miguët, *Political Corruption and Party Funding in Western Europe*, 1 – 3 (April 2004), prepared following the Transparency International Western Europe group meeting, Athens, Greece, Sept. 13-15, 2002, [http://www.transparency.org/content/download/5466/31891/file/political\\_corruption\\_party\\_financing\\_western\\_eu\\_overview.pdf](http://www.transparency.org/content/download/5466/31891/file/political_corruption_party_financing_western_eu_overview.pdf).

81. Council of Europe [CE], Criminal Law Convention on Corruption, Jan. 27, 1999, CETS 173. As of March 10, 2011, all but five of the Members States of the CE have ratified the convention. See Criminal Law Convention on Corruption, Council of Europe, *available at* <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=173&CM=&DF=&CL=EN>; Organization for Economic Co-operation and Development [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 ILM 1, *available at* <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

82. United Nations Convention Against Corruption, G.A. Res. 58/4, arts. 15, 17, 25, U.N. Doc. A/58/422 (Oct. 31, 2003), *available at* [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).



off point for an analysis of liability for holders of Italy's highest public offices is the Italian Constitution, which was enacted in December 1947 and came into force January 1, 1948.<sup>83</sup> Since that time there have been several amendments, though Parliamentary Commissions charged with preparing more substantial revisions to the original text have failed for lack of political consensus.<sup>84</sup> The Italian Constitutional provisions that pertain to immunity for officeholders are those relating to equality before the law (Article 3), qualified Parliamentary immunity (Article 68), presidential impeachment (Article 90), ministerial liability to suit (Article 96), and constitutional amendment (Article 138).<sup>85</sup> Most directly, under Article 96, the Prime Minister (president of the council of ministers) and the ministers are "subject to normal justice for crimes committed in the exercise of their duties," with the one qualification that authorization for such "justice" be given by one of the houses of Parliament.<sup>86</sup>

### ***B. Berlusconi's First Attempt at Immunity: Lex Berlusconi***

Given the legal controversies that plagued Berlusconi in and out of office, it is not surprising that he would be the first Prime Minister to attempt to change the framework of immunity for Italy's highest public servants. In June of 2003, perhaps not coincidentally when the rotating presidency of the European Union fell to Italy, the Italian Senate passed what is referred to as the Schifani Law, named after the Senator that had authored the legislation, Renato Schifani.<sup>87</sup> The law, entitled "Provisions for the adjustment of Article 68 of the Constitution concerning criminal proceedings with regard to high state office," conferred immunity from prosecution while in office upon Italy's five highest-ranking government officials: the president of the republic, the presidents of both houses of Parliament, the president of the Constitutional Court, and the Prime Minister

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83. Mario Einaudi, *The Constitution of the Italian Republic*, 42 AM. POL. SCI. REV. 675 – 76 (1948).

84. Comba, *supra* note 49, at 58 – 59.

85. COST. arts. 3, 68, 90, 96, 138 (Italy).

86. COST. art 96 (Italy).

87. Backers of the immunity law said that its purpose was to reduce politically motivated prosecutions and to spare Italy the possible humiliation of Berlusconi being convicted during the second half of the year, when Italy held the rotating presidency. See Frank Bruni, *Italian Leader, in a First, Testifies at His Own Bribery Trial*, N.Y. TIMES, May 6, 2003, <http://query.nytimes.com/gst/fullpage.html?res=9C0CE3D7103CF935A35756C0A9659C8B63>.

(president of the Council of Ministers).<sup>88</sup> The terms of the law were expansive: It exempted the named positions from prosecution for any crime, even those concerning events that took place prior to assumption of office; suspended any trials that were ongoing; and provided that the statutes of limitation for any pending offense were to run during the term of office.<sup>89</sup> Notably, only one of those covered under the law was facing criminal charges – Prime Minister Berlusconi.<sup>90</sup> As the Schifani Law had the effect of halting criminal proceedings against the sitting Prime Minister – and rotating president of the European Union – it is no surprise that the law was soon thereafter referred to as *lex Berlusconi*.<sup>91</sup> The prime justification for the law then – that it would enable selected government officials to perform their functions without disturbance while in office – seems, retrospectively, questionable in application.<sup>92</sup>

Due to the law's constitutional shortcomings, however, it would be struck down for reasons other than the questionable basis upon which it was enacted. In January of 2004, the Italian Constitutional Court, after hearing challenges to *lex Berlusconi*, invalidated the law, finding it violative of two central provisions of the Italian Constitution – those that guarantee equality before the law and due process.<sup>93</sup> A few months later, a corruption trial against Berlusconi would resume, though to little effect.<sup>94</sup>

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88. Gazz. Uff., 21 Jun. 2003, n.142, Legge, 20 Jun. 2003, n.140, available at <http://www.camera.it/parlam/leggi/03140l.htm>. Title is translated from original Italian: “Disposizioni per l’attuazione dell’articolo 68 della Costituzione nonche’ in materia di processi penali nei confronti delle alte cariche dello Stato.”

89. Oellers-Frahm, *supra* note 59, at 109.

90. See Bruni, *supra* note 87.

91. Oellers-Frahm, *supra* note 59, at 109.

92. *Id.* at 110.

93. Racc. uff. corte cost. judgment no. 24 of Jan. 20, 2004, available at <http://www.giurcost.org/decisioni/2004/0024s-04.html>; see also Brianne Biggiani, *Designs for Immunity: A Comparison of the Criminal Prosecution of United States Presidents & Italian Prime Ministers*, 14 CARDOZO J. INT’L & COMP. L. 209, 221 (2006).

94. Berlusconi was charged with bribing judges in relation to a take-over battle for publisher Mondadori. The case was eventually thrown out because the statute of limitations on the alleged offense expired. *Q & A: Berlusconi v the courts*, *supra* note 21.

### ***C. Berlusconi's Second Attempt at Immunity: Lex Berlusconi Reprise***

#### ***1. The Law: Lodo Alfano***

While it took two years for the media mogul to regain the premiership, it only took him and his backers two months to get another immunity law on the books, this time authored by the Minister of Justice, Angelino Alfano.<sup>95</sup> Article 1 of *Lodo Alfano*, as the law became known, suspended criminal proceedings against Italy's four highest officeholders until the end of their terms, covering trials based on alleged offenses that occurred both during and prior to taking office.<sup>96</sup> Article 1(1) read:

Without prejudice to the cases governed by Articles 90 and 96 of the Constitution, any criminal proceedings against individuals which occupy the offices of the President . . . or Prime Minister shall be suspended from the time when the office or function is taken up until the end of the term in office. The suspension shall also apply to criminal proceedings for conduct prior to taking up the office or function.<sup>97</sup>

Sub-section 7 of Article 1 applied to any proceedings that may be ongoing against the offices covered: "[t]he provisions of the present Article shall also apply to criminal proceedings in progress, at every stage, state or instance, at the time when the present law enters into force."<sup>98</sup> Interestingly, the text and scope of the law effectively mirrored the flaws that existed in *Lex Berlusconi*, although the newest versions froze the statutes of limitations rather than letting them run while in office. Once again, the Prime Minister was the only person covered by the law who was currently facing criminal proceedings.<sup>99</sup> Nonetheless, the law's passage did not come as a great surprise to much of Italy, as the country had seen Berlusconi dodge controversy

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95. The law worked its way through Parliament in a record twenty-five days. Nick Pisa, *Silvio Berlusconi Immune from Prosecution While in Office After Law Passed*, TELEGRAPH (London), Jul. 22, 2008, <http://www.telegraph.co.uk/news/worldnews/europe/italy/2446529/Silvio-Berlusconi-immune-from-prosecution-while-in-office-after-law-passed.html>.

96. Gazz. Uff., 25 jul. 2008, n.173, Legge, 23 jul. 2008, n.124, available at <http://www.camera.it/parlam/leggi/08124l.htm>.

97. *Id.* art. 1(1), translated from original Italian.

98. *Id.* art. 1(7), translated from original Italian.

99. *MPs Pass Berlusconi Immunity Bill*, BBC NEWS, Jul. 11, 2008, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7501825.stm> (last visited Apr. 11, 2011).

and reemerge time and again, tanned and reinvigorated.<sup>100</sup> While the justifications for the law mimicked those given for the Schifani Law, the timing of the law – and indeed the pace at which it made its way through Parliament – was unlikely a coincidence. The corruption trial against Berlusconi for the alleged bribing of a British lawyer was coming to a close.<sup>101</sup> Members of the opposition did not hide their skepticism about the stated purposes of the law, calling it an “ad personam” law meant to protect the Prime Minister alone.<sup>102</sup> Though *lodo Alfano* would remain in effect for more than twice as long its predecessor, it could not evade review by the Constitutional Court.

## 2. The Constitutional Court's Response to Lodo Alfano

On September 26, 2008, Milan prosecutors brought a challenge to the immunity law, alleging constitutional violations under Articles 3 and 138, those dealing with equality and the amendment process, respectively.<sup>103</sup> In its referral order to the Constitutional Court, the Milan tribunal argued that the passage of the law contravened Article 3 because selectively limiting liability creates a tiered system and undermines the principle of equality before the law.<sup>104</sup> Further, the tribunal contended that because the law impacted the privileges of constitutional organs, it could only have been adopted by way of amendment to the constitution.<sup>105</sup> Rather than employing the amendment process, however, the drafters of *lodo Alfano* introduced it as a piece of ordinary legislation.

Defenders of the law, joined by the Prime Minister at trial, argued that the contested provision was constitutional because strict

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100. The newspaper *La Repubblica* was quoted saying “Only in Italy could such an anomaly be passed.” Pisa, *supra* note 95.

101. Richard Owen, *New Law Gives Silvio Berlusconi Immunity from Prosecution*, TIMES (London), Jun. 27, 2008, <http://www.timesonline.co.uk/tol/news/world/europe/article4225476.ece>.

102. Pisa, *supra* note 95.

103. Racc. uff. corte cost. judgment n.262 of oct. 7, 2009, available at [http://www.Cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S2009262\\_Amirante\\_Gallo.doc](http://www.Cortecostituzionale.it/documenti/download/doc/recent_judgments/S2009262_Amirante_Gallo.doc). Author relied upon translation of Italian Constitutional Court Decision 262 of 2009 as provided by the Court's website according to the URL above. Citations to the decision will be made with reference to sections as they appear in the original and translated version. Decision 262 of 2009 is divided, as per tradition, into two larger sections: first, Facts of the Case (Facts), and second, Conclusions of Law (Law). References will include in which of these two larger sections, Facts or Law, the specific section numbers can be located.

104. *Id.* §§ 1.4-1.5 (Law).

105. *Id.* § 1.2 (Law).

equality before the law does not exist, and certain immunities were already present within the Constitution. They based their argument on two grounds. First, Articles 68 and 90, which speak to functional immunity for members of Parliament and the President of the Republic, already partially remove officials from susceptibility to prosecution.<sup>106</sup> Second, Article 96, which covers the Prime Minister, provides for the stripping of immunity – and leveraging of charges – only in the case that one of the houses of Parliament approves it.<sup>107</sup> Additionally, the law contained a provision by which an official could waive immunity in order to defend himself against charges, itself an inviolable right under Article 111 of the Constitution.<sup>108</sup> The defense also asserted that the prosecution should be barred from asserting a violation under Article 138 because the amendment provision had not been cited in the Court's invalidation of the Schifani Law.<sup>109</sup> Finally, as a general justification for the law, the defense pointed to the fact that such immunity is firmly rooted in international law and incorporated into the Constitution by way of Article 10.<sup>110</sup>

The Constitutional Court rejected the defense's assertions of constitutionality with regards to Articles 3 and 138. Relying partially on the basis for its decision on *lex Berlusconi*, the Court held that while the Constitution did confer prosecutorial privilege upon some offices, such exceptions were in regard to official conduct – rather than the blanket immunity of *lodo Alfano* – and had a precise basis in the Constitution itself.<sup>111</sup> Moreover, the privileges promulgated under the contested law undermined specific constitutional provisions by granting greater protection to the Prime Minister than it did to other ministers.<sup>112</sup> As to Article 138, the Court stated that while Parliament is free to enact ordinary legislation that implements procedures which relate to extant constitutional provisions, it was not permitted to enact ordinary legislation governing immunity.<sup>113</sup> Further, the fact that the amendment provision did not find its way into the Court's decision in January of 2004 did not bar its application in the present

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106. *Id.* § 2.2.1 (Facts).

107. *Id.*

108. *Id.* § 2.2.3 (Facts).

109. *Id.* § 1.2.1 (Facts).

110. *Id.* § 2.2.5 (Facts).

111. *Id.* §§ 7.3.2.3.1-7.3.3 (Law).

112. *Id.* § 7.3.2.3.1 (Law).

113. *Id.* § 7.3.1 (Law).

case; there is no requirement that every possible constitutional argument be leveraged against a particular law in a finding of unconstitutionality.<sup>114</sup> Finally, the Court rejected the defense's arguments concerning international law by drawing a distinction between diplomatic immunity – which did have a sound basis in international law – and the domestic immunity of ministers and presidents of constitutional bodies – on which international law had no bearing.<sup>115</sup> Accordingly, on October 7, 2009, the Constitutional Court declared Law No. 124 of 2008 unconstitutional under Articles 3 and 138, in relation to the privileges contained in Articles 68, 90, and 96.<sup>116</sup> Absent a constitutional amendment, the grant of immunity to government officials was invalid.

In line with his normal defense, the Prime Minister criticized the decision in televised remarks, calling the Court a “political organ” and accusing the opposition and press of conspiring against him.<sup>117</sup> Showing his usual gusto in the face of controversy, Berlusconi beamed: “I feel reinvigorated. . . . Long live Italy! Long live Berlusconi!”<sup>118</sup>

3. *The Decision's Impact on Berlusconi:  
The Trials Must (Surely) Go On*

The most immediate effect in the wake of the Court's 2009 ruling was that Berlusconi became a private citizen before the law, meaning that pending trials would (theoretically) be able to proceed against him.<sup>119</sup> Three trials had been suspended following the law's passage in the summer of 2008.<sup>120</sup>

In the first case, prosecutors alleged that Berlusconi had paid British lawyer David Mills \$600,000 to give false testimony regarding the Prime Minister's offshore financial activities.<sup>121</sup> In February of 2009, Mills was convicted in an Italian court in relation to the bribe and received a four-and-a-half year sentence, a decision he vowed to

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114. *Id.* § 7.2 (Law).

115. *Id.* § 7.3.1 (Law).

116. *Id.* § 8 (Law).

117. Editorial, *The Law and Silvio Berlusconi*, N.Y. TIMES, Oct. 9, 2009, at A30.

118. Meichtry & Galloni, *supra* note 26.

119. *But see infra* Section V.D.

120. *The Law and Silvio Berlusconi*, *supra* note 117.

121. *Id.*

appeal.<sup>122</sup> Notably, Berlusconi had been a co-defendant in the case until his immunity came through.<sup>123</sup> Mills appealed the decision, and the case came before Italy's highest appeals court on February 25, 2010.<sup>124</sup> In a blow to prosecutors, the court held that the alleged bribe occurred in 1999 - rather than in 2000 as the lower courts had found - resulting in the expiration of the ten-year statute of limitations.<sup>125</sup> This had particular import for Berlusconi, whose trial on the same corruption charges was supposed to restart on February 27, 2010, following a postponement granted to await a final resolution of the Mills case.<sup>126</sup> The court's decision implied that the statute of limitations in the Prime Minister's trial would expire in spring of 2011, at the latest.<sup>127</sup> While the disposition of the case against the British lawyer had been hailed as a victory for Berlusconi, the high court found that Mills did in fact receive the payment.<sup>128</sup> Progress in the Prime Minister's trial, originally set to continue on March 26, 2010,<sup>129</sup> has been stymied by further legal impediments,<sup>130</sup> though a hearing occurred on March 21, 2011.<sup>131</sup> Due to the delay, the statute of

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122. Donadio, *supra* note 15.

123. *Id.*

124. *Berlusconi Trial Suspended*, UPI, Jan. 15, 2010, [http://www.upi.com/Top\\_News/International/2010/01/15/Berlusconi-trial-suspended/UPI-13211263596729/](http://www.upi.com/Top_News/International/2010/01/15/Berlusconi-trial-suspended/UPI-13211263596729/).

125. Richard Owen, *Berlusconi's Victory in Mills Court Case Is only a Hollow One*, TIMES (London), Feb. 26, 2010, [http://www.timesonline.co.uk/tol/news/world/world\\_agenda/article7042658.ece](http://www.timesonline.co.uk/tol/news/world/world_agenda/article7042658.ece).

126. The court also denied the defense's motion to throw out evidence already presented during Mills's trials, including that which allegedly showed the Prime Minister having authorized the payment to Mills. *Berlusconi Trial Suspended*, *supra* note 124.

127. See Stacy Meichtry, *Italy Throws Out Trial of Berlusconi Lawyer*, WALL ST. J., Feb. 26, 2010, available at <http://online.wsj.com/article/SB10001424052748704479404575087744045529452.html>. Note that this was altered by subsequent legislation. See *infra* Section V.D.

128. *Id.*

129. Nick Squires, *Court Insists Silvio Berlusconi's Bribery Trial Must Continue Next Month*, TELEGRAPH (London), Feb. 27, 2010, <http://www.telegraph.co.uk/news/worldnews/europe/italy/7332333/Court-insists-Silvio-Berlusconis-bribery-trial-must-continue-next-month.html>.

130. See *infra* Section V.D.

131. However, due to an emergency meeting on the ongoing crisis in Libya, however, the Italian Prime Minister was unable to attend. *Libya: Silvio Berlusconi 'Will Not Attend Trial Due to Libya'*, TELEGRAPH (London), Mar. 18, 2011, <http://www.telegraph.co.uk/news/worldnews/silvio-berlusconi/8391775/Libya-Silvio-Berlusconi-will-not-attend-trial-due-to-Libya.html>.

limitations will now likely expire in February of 2012.<sup>132</sup>

The second case involves accusations of tax fraud and false accounting by Mediaset in relation to a series of transactions carried out by the Prime Minister's company in the 1990s.<sup>133</sup> Along with eleven named co-defendants (Mills among them), Berlusconi is accused of using offshore companies to purchase American television and movie rights, then reselling them at inflated rates to Mediaset, lowering its tax payments.<sup>134</sup> Mediaset has maintained that the film rights were purchased at market prices and that any trial will bear that out.<sup>135</sup> February 28, 2011, marked the most recent hearing in the case.<sup>136</sup> If somehow Berlusconi is ever convicted of the charges, he would face from eighteen months to six years in prison.<sup>137</sup>

Additionally, Berlusconi has been accused of embezzlement and tax fraud related to Mediaset, allegedly having had a hand in causing damage to shareholders and evading taxes.<sup>138</sup> The most recent hearing in this case occurred on March 5, 2011.<sup>139</sup>

#### *D. Berlusconi's Third Attempt at Immunity: Legal Reform*

##### *1. Legitimate Impediment Law*

Faced with ever-increasing legal pressures in the wake of losing his immunity from prosecution, the Italian Prime Minister sought to reform Italy's judicial system in order to protect himself from what he deemed an overly political judiciary, bent on his destruction.<sup>140</sup> In the

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132. John Hooper, *Silvio Berlusconi Back on Trial as Tax Fraud Court Case Resumes in Italy*, GUARDIAN (London), Feb. 28, 2011, available at <http://www.guardian.co.uk/world/2011/feb/28/silvio-berlusconi-court-cases-resume>.

133. *The Law and Silvio Berlusconi*, *supra* note 117.

134. *Id.*

135. Frances D'emilio, *Latest Probe of Berlusconi Completed*, ASSOCIATED PRESS, Jan. 23, 2010, available at [http://www.taiwannews.com.tw/etn/news\\_content.php?id=1162777&lang=eng\\_news&cate\\_img=83.jpg&cate\\_rss=news\\_Politics](http://www.taiwannews.com.tw/etn/news_content.php?id=1162777&lang=eng_news&cate_img=83.jpg&cate_rss=news_Politics).

136. Hooper, *supra* note 132.

137. *Id.*

138. Amelia Mathias, *Italy's PM Berlusconi May Face Third Corruption Trial: Reports*, JURIST, Jan. 24, 2010, available at <http://jurist.law.pitt.edu/paperchase/2010/01/italy-pm-berlusconi-may-face-third.php>.

139. Berlusconi was not present in court however and the trial was adjourned until April 11, 2011. Paolo Biondi & James Mackenzie, *Berlusconi to Appear in Court in Person, Ally Says*, REUTERS, Mar. 15, 2011, available at <http://www.reuters.com/article/2011/03/15/us-italy-berlusconi-trial-idUSTRE72E6U320110315>.

140. Richard Owen, *Silvio Berlusconi Returns to Draft New Immunity Laws*,



wake of the 2009 Constitutional Court decision, Berlusconi supported two draft bills, each of which would have an effect on his current and potential future legal battles. The first, which was approved by Parliament on March 10, 2010, and is known as the “legitimate impediment” law,<sup>141</sup> permits cabinet members – Berlusconi included – to postpone criminal proceedings against them on the grounds that they would interfere with official duties.<sup>142</sup> A second law, which was approved on January 19, 2010, by the upper house and intended to make the Italian justice system more efficient, would end trials that fail to reach a first-instance sentence within two years.<sup>143</sup> This latter effort by Berlusconi appears to have been stalled in Parliament, perhaps permanently.<sup>144</sup>

In the short term, the successfully passed legitimate impediment law effectively solved Berlusconi’s pending legal problems in the wake of the 2009 Constitutional Court decision. The law was artfully crafted: when invoked, it served to automatically delay trials against high-ranking officials, barring review by the court.<sup>145</sup> As such, despite his supposed new status as a private citizen following the reversal of *Iodo Alfano*, the Prime Minister regained his advantage and the trials against him were once again put on hold.<sup>146</sup>

## 2. *The Constitutional Court’s Response to the Legitimate Impediment Law*

On January 13, 2011, seven years after it struck down *lex Berlusconi*, the Constitutional Court registered its latest pronouncement against the Prime Minister.<sup>147</sup> In a twelve-to-three

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TIMES (London), Jan. 12, 2010, *available at* <http://www.timesonline.co.uk/tol/news/world/europe/article6983862.ece>.

141. Gazz. Uff., 8 apr. 2010, n.81, Legge, 7 apr. 2010, n.51.

142. See Bas Mesters, *Berlusconi Close to Renewed Legal Immunity*, NRC HANDESLBLAD (The Netherlands), Feb. 4, 2010, *available at* [http://www.nrc.nl/international/article2475746.ece/Berlusconi\\_close\\_to\\_renewed\\_legal\\_immunity](http://www.nrc.nl/international/article2475746.ece/Berlusconi_close_to_renewed_legal_immunity); see also Guy Dinmore, *Berlusconi Wins Reprieve*, FINANCIAL TIMES (London), Mar. 10, 2010, *available at* <http://www.ft.com/cms/s/0/89390398-2c80-11df-be45-00144feabdc0.html#axzz1Jd3N85FZ>.

143. Giulia Segreti, *Draft Law Could Ease Berlusconi’s Legal Woes*, FINANCIAL TIMES (London), Jan. 21, 2010, *available at* <http://www.ft.com/cms/s/0/5d7042fe-05e7-11df-8c97-00144feabdc0.html>.

144. Dinmore, *supra* note 142.

145. Povoledo & Pianigiani, *supra* note 7.

146. Dinmore, *supra* note 142; see also Povoledo & Pianigiani, *supra* note 7.

147. Racc. uff. corte cost. judgment no.23 of jan. 13, 2011, *available at*

ruling, the Court rejected crucial parts of the legitimate impediment law, most importantly revoking the automatic immunity that the law conferred upon cabinet ministers.<sup>148</sup> Under the law as written, trial judges had no discretion to reject an official's assertion of a legitimate impediment to mounting a defense.<sup>149</sup> The Court decision, while not voiding the law in its entirety, permits lower court judges to determine whether or not the excuse is valid.<sup>150</sup> Following an adverse decision, then, a defendant has a right to appeal to the Constitutional Court for a final determination on the matter.<sup>151</sup> The ruling also modifies the law to permit only six months of postponement of charges, rather than the eighteen months as originally specified.<sup>152</sup> Unlike the prior court decisions on immunity, the January 2011 ruling leaves a potential partial immunity intact for Berlusconi and other top officials. A familiar situation confronts the Prime Minister: Trials against him are once again set to move forward, albeit at an undetermined pace. On top of the three fraud and tax-related cases pending, Berlusconi is now charged with abuse of power and juvenile prostitution, which carry maximum sentences of three and twelve years in prison.<sup>153</sup> The Prime Minister has called the accusations groundless and the judiciary guilty of mounting a "moral coup."<sup>154</sup>

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<http://www.giurcost.org/decisioni/2011/0023s-11.html>.

148. Povoledo & Pianigiani, *supra* note 7. Interestingly, the Legitimate Impediment law was also struck down for violating Articles 3 and 138 of the Italian Constitution, the same grounds as the prior immunity laws had been. See Press Release, Corte Cost., Legge, 7 apr. 2010, n.51 (sul "legittimo impedimento"), Jan. 13, 2011, available at [http://www.cortecostituzionale.it/documenti/comunicatistampa/CC\\_CS\\_20110114094032.doc](http://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20110114094032.doc).

149. Povoledo & Pianigiani, *supra* note 7.

150. See, e.g., Hooper, *supra* note 6.

151. *Id.*

152. Julia Zebley, *Italy Court Weakens Law Temporarily Providing Immunity for Public Officials*, JURIST, Jan. 13, 2011, available at <http://jurist.org/paperchase/2011/01/italy-weakens-berlusconi-backed-law-temporarily-providing-immunity-for-public-officials.php>.

153. *Ruby Red Face*, *supra* note 24.

154. Rachel Donadio, *Trial Is Set for Berlusconi in Prostitution Case*, N.Y. TIMES, Feb. 15, 2011, at A4.

## VII. The Impact of the Court's Decisions on Italy

### *A. Endorsement of Democracy and the Rule of Law*

Berlusconi has thrice been rebuked by the Constitutional Court. Although not enough to instill in the Italian people complete faith in the rule of law and proper functioning of government, it signals that the Republic's foundational document is intact and relatively inviolable. Important in the Court's rulings – especially the decision of October 6, 2009, regarding *lodo Alfano* – is the assertion that the measures themselves, while independently repugnant to the constitution, may not have been had they been brought about in a constitutional manner – that is, as an amendment.<sup>155</sup> In sending the message that the document has teeth, the Court showed that there is some semblance of legitimacy left in the Italian judiciary, despite its shortcomings. Berlusconi's attempts to undermine such legitimacy by claiming that the Court is politically biased flies in the face of a ruling that, in fact, bolsters its integrity and impartiality.

Democracy was a central aspect of the Court's decision on *lodo Alfano*. In holding the law unconstitutional under, inter alia, Article 3 of the constitution, the Court looked to its pronouncement on *lex Berlusconi* in January of 2004. There, in invalidating the previous attempt at immunity, the Court held that that “no constitutional law . . . may subvert one of the fundamental principles of the modern state governed by the rule of law, consisting in the equal status of citizens before the courts. . . .”<sup>156</sup> By firmly upholding the guarantees of Article 3 in its decision of October 2009, the Court made an important endorsement of democracy. Regardless of the depth and scope of Berlusconi's power, wealth and influence cannot constitutionally place an individual above the law. The Prime Minister has chided the Constitutional Court for undermining his legitimacy without the support of the people; judges for the Court are appointed and not elected.<sup>157</sup> Of course, the irony is that he is

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155. COST. art. 138 (Italy).

156. Corte Costituzionale [Constitutional Court], 7 Oct. 2009, § 3.1.3 (Facts), translation available at [http://www.Cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S2009262\\_Amirante\\_Gallo.doc](http://www.Cortecostituzionale.it/documenti/download/doc/recent_judgments/S2009262_Amirante_Gallo.doc).

157. Berlusconi has made it clear that he considers his own authority more legitimate than that of the Constitutional Court by nature of having been elected.

criticizing the Court for blocking his attempt to place himself above the people, in contravention of the constitution. While the Prime Minister has worked to remove himself from the normal reach of the court system – and by way of delay and alleged corruption of judges has effectively succeeded in that pursuit – there are some limits to his capacity to do so, however meager they may be. The Court's unambiguous decision on *Iodo Alfano* – as well as its reliance on similar reasoning in revoking parts of the legitimate impediment law – reinforces democracy and the rule of law in Italy, regardless of how or whether pending trials proceed against Berlusconi.

## ***B. Identification of Areas That Need Reform***

### *1. Judicial Efficiency*

The administration of justice in Italy is seriously hampered by delay. Indeed, by the end of the twentieth century, a civil dispute averaged roughly ten years from first instance to final disposition in the Supreme Court.<sup>158</sup> One of the above-mentioned reforms currently making its way through Parliament – at the behest of Berlusconi – seeks to address this backlog of cases by terminating delayed trials rather than improving the mechanisms of justice.<sup>159</sup> This measure could be seen as an indirect attempt to spur greater efficiency, although it suggests a submission to the flaws of the system rather than an effort to address them. The Prime Minister serves as an excellent case study in the potential dangers of judicial backlog and delay. Certainly, statutes of limitation serve the worthy goals of fairness and due process, enshrined in Article 111 of the constitution.<sup>160</sup> However when such limits work against the

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Massimo Franco, *La Sentenza della Corte Costituzionale: I Danni di un conflitto* [Constitutional Court Ruling: Fall-out From A Clash], CORRIERE DELLA SERA, Oct. 8, 2009, available at [http://www.corriere.it/editoriali/09\\_ottobre\\_08/franco\\_c0f39a26-b3c9-11de-afa2-00144f02aabc.shtml](http://www.corriere.it/editoriali/09_ottobre_08/franco_c0f39a26-b3c9-11de-afa2-00144f02aabc.shtml). Judges on the Constitutional Court are selected, in even part, by the president of the republic, the Parliament, and by ordinary and administrative supreme courts. COST. art. 135 (Italy).

158. Varano, *supra* note 20, at 112.

159. If cases exceed certain set time limits, they are thrown out resulting in the acquittal of the defendant. Some suggest that this would lead to *de facto* amnesty for persons accused of crimes committed prior to spring of 2006. See Steve Czajkowski, *Italy Judges Walk Out over Proposed Judicial Reforms Favoring Berlusconi*, JURIST, Jan. 31, 2010, available at <http://jurist.law.pitt.edu/paperchase/2010/01/italy-judges-walk-out-over-proposed.php>. Notably, this law has not received the required approval by both houses of Parliament.

160. *Giusto processo* ("due process") was integrated into the constitution by way

disposition of a case on the merits – and certainly, the trial against Mills provides a recent example – it is hard to deny that more substantive reform is in order. This is not to say that all those whose trials are expunged by reason of the passage of time would have been found guilty. Nor is it to suggest that the Italian judicial and political system – or Europe more generally – is not acutely aware of problems that plague the efficient resolution of cases in Italy.<sup>161</sup> Viewing the situation from the standpoint of an aggrieved complainant, rather than from that of a well-connected media mogul, the argument for accelerating the rate of justice has never been more apparent.

On the point of an independent and efficient judiciary, the Prime Minister himself has begun to take tangible, legislative steps with an eye toward reform. On March 10, 2011, the Prime Minister and his cabinet approved a measure that would allow citizens to sue judges for miscarriage of justice as well as give Parliament greater scope to intervene in the judiciary.<sup>162</sup> Such a measure would require changes to Italy's Constitution and therefore needs two-thirds approval from both houses of Parliament to go into effect.<sup>163</sup> Opponents of this and other related bills that are rumored to be in the works have labeled such reform attempts as, perhaps ironically, undermining the autonomy and independence of the judiciary.<sup>164</sup> At least on its face, the newly-approved bill seems to provide further avenues for challenging judicial pronouncements, should one be so inclined.

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of Law No. 2 of Nov. 23 1999. Varano, *supra* note 20, at 121.

161. Delay in Italian courts is a matter of national and international concern. See, e.g., Interim Resolution on the Execution of the judgments of the European Court of Human Rights concerning excessive length of judicial proceedings in Italy: Progress achieved and outstanding issues in the context of general measures to ensure compliance with the judgments of the European Court of Human Rights, CM/ResDH (2009) 42 (Mar. 19, 2009), available at <https://wcd.coe.int/ViewDoc.jsp?id=1423157&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>; see also Luca De Matteis, *Reasonable Delay in the Italian Justice System: A European Perspective*, Jun. 30, 2008, intervention at the 39th Congress of the Associazione Nazionale Magistrati, held in Rome on Jun. 6, 2008, available at [http://www.europeanrights.eu/getFile.php?name=public/commenti/testo\\_de\\_matteis.doc](http://www.europeanrights.eu/getFile.php?name=public/commenti/testo_de_matteis.doc).

162. Elisabetta Povoledo, *Berlusconi Plan Takes on Italian Judiciary*, N.Y. TIMES, Mar. 10, 2011, <http://www.nytimes.com/2011/03/11/world/europe/11italy.html?ref=silvioberlusconi>.

163. John Hooper, *Silvio Berlusconi Approves Move to Sue Judges for Trial Errors*, GUARDIAN (London), Mar. 10, 2011, [http://www.guardian.co.uk/world/2011/mar/10/silvio-berlusconi-move-sue-judges?CMP=twf\\_fd](http://www.guardian.co.uk/world/2011/mar/10/silvio-berlusconi-move-sue-judges?CMP=twf_fd).

164. *Id.*

## 2. *Conflicts of Interest*

It is difficult to examine Berlusconi's political career without some regard for the conflicts of interest that were attendant to his rise to power. Whether or not he wielded his vast fortune and domain over Italian media to the detriment of the office of Prime Minister, the coupling of his financial and political power has, at the very least, presented the opportunity for abuse. As Berlusconi has ultimately avoided conviction, it may be unfair to presume that, absent alleged meddling and stall tactics, he would have been found guilty at some point over the past two decades. Nonetheless, it seems puerile to attribute his penchant for being on the receiving end of criminal charges to mere judicial bias or left-wing conspiracy. The mere fact that such conflicts of interest were present upon Berlusconi's entry into politics – and have persevered throughout his protracted tenure at the helm of the center-right – is an argument for approaching candidates with similar means and influence more skeptically in the future.

## VIII. Conclusion

In the face of unrelenting controversy and in the wake of the Constitutional Court's invalidation of *Iodo Alfano* and the legitimate impediment law, Berlusconi has promised to stay on as Prime Minister.<sup>165</sup> Given the legal reforms that appear to be progressing through Parliament, and his history of evasiveness, there appears to be little reason to doubt his confidence. Despite his likely place among the most prosecuted individuals in history – a distinction he seems to carry with a sense of pride – Berlusconi has managed to evade the grips of the Italian justice system at every turn. Regardless of this success, and perhaps because of it, the Prime Minister has exposed the ramifications of a sclerotic and delay-ridden justice system. Riding into office in 1994 on a platform of reform and integrity, Berlusconi promised to usher in a new era of responsible politics in Italy. Fifteen years later it is not clear that he has even approached that goal. The Constitutional Court took an important stand in rejecting his efforts to place himself and Italy's other top officials above the law. Whether or not the decisions will engender a reversal of fortune for the embattled Prime Minister, they showed that his power is not without limit.

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165. Berlusconi has "no intention of stepping down, whatever the court's ruling" on legitimate impediment law. Povoledo & Pianigiani, *supra* note 7.

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